FILED
SEP 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 419

UNITED STATES OF AMERICA,

Respondent,

—*against*—

ANGELO PACCIONE,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE ALPERT PRESS — TRIANGLE 5-1058-1059

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

ANGELO PACCIONE, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered on the 27th day of July, 1955, affirming the judgment of conviction entered in the United States District Court for the Southern District of New York, on a jury verdict of guilty of violation of Title 21, Sections 173-174, United States Code, and in violation of Title 18, Section 371, United States Code.

OPINIONS BELOW.

The decision and opinion of the United States Court of Appeals has not yet been reported.

JURISDICTIONAL STATEMENT.

No formal opinion was rendered by the District Court. The judgment of the United States Court of Appeals was dated and entered on July 27, 1955. Associate Justice Clark of this Court granted an application to extend the time of the petitioner to make this application until September 24, 1955.

THE QUESTIONS PRESENTED FOR REVIEW.

1. The petitioner was found guilty of a sale of one-fourth ounce of heroin on May 6, 1953, possession of ten ounces of heroin on May 8, 1953, in violation of the Federal Narcotic Laws (Title 21, Sections 173-174, United States Code) and the crime of conspiracy to violate the Federal Narcotic Laws, in violation of Title 18, Section 371, United States Code, and was sentenced to a term of five years on each count, to run consecutively, making a total sentence of fifteen years. This sentence was wholly excessive and in view of the fact that it was petitioner's first offense for the violation of any of the laws of the United States and the first offense in connection with narcotics, the sentence was wholly at variance with established punishment for such crimes. (The only prior conviction was that for Grand Larceny in the New York State Court, in the year 1936, when he was sentenced to a term of three to ten years, at a time when he was twenty-one years of age.)

2. The petitioner was compelled to proceed to trial with counsel not of his own choice, after he had lost confidence in said lawyer, and desired an adjournment for the purpose of having his new lawyer, whom he had already retained, try his case.

3. The trial court refused to grant the petitioner a writ of habeas corpus *ad testificandum* to produce from the Federal Penitentiary at Milan, Michigan, the two co-defendants

who were named in the same indictment with the petitioner, who were important and necessary witnesses who would have exculpated the petitioner herein, and as a result, petitioner was deprived of their testimony and compelled to proceed to trial without the testimony of said witnesses.

STATEMENT OF THE CASE.

Petitioner Paccione was charged with Counts I, IV and V of a five count indictment filed May 29, 1953. Counts IV and V charged respectively a sale of one-fourth ounce of heroin on May 6, 1953 and possession of ten ounces of heroin on May 8, 1953, in violation of the Federal Narcotic Laws (Title 21, Sections 173-174, United States Code). Count I charged a conspiracy to violate the Federal Narcotic Laws in violation of Title 18, Section 371, United States Code.

The two co-defendants, Anthony Musarra and Nicholas Constantino were charged with similar offenses in the same indictment.[1]

On October 15, 1954, Musarra and Constantino, who had entered pleas of guilty to the indictment on February 8, 1954, were sentenced to *four years each.*

Trial as to petitioner Paccione began on Friday, December 10, 1954, and the case was adjourned until Tuesday, December 14th, due to the fact that the court was completing another case, which was then in progress. On December 14, 1954, the case was further adjourned to December 16, 1954. On December 16, 1954, the court was apprised that petitioner's lawyer, Mr. Vecchiarelli, was ill. The case was again adjourned until December 17, 1954, and then again until December 20, 1954.

---

[1] Musarra and Constantino were joined with Paccione as co-defendants in the conspiracy charge under Count I. Both were named as defendants in Counts II and III charging sales of one-fourth ounce of heroin on March 6 and March 10, 1953; and Musarra was joined with Paccione in Count IV charging a sale of heroin on May 6, 1953.

On the morning of December 20, 1954, petitioner's lawyer requested a writ to bring the two co-defendants named in the indictment from Milan, Michigan, to testify. This application was opposed by the Assistant United States Attorney, although he admitted that he had misinformed the said attorney that the said witnesses were at that time in Milan, Michigan. Because of this information, the attorney proceeded to Milan, Michigan, and found that the said witnesses were not in Michigan (R. 9).[2]

The court was informed by the Assistant United States Attorney that counsel for petitioner had been lax in procuring the attendance of said witnesses at the trial.

Thereupon, the court denied the request for an adjournment of the trial for the purpose of bringing in said witnesses.

This was done by the court, although it knew that the attorney for petitioner had been ill for the prior ten days.

Upon hearing this, petitioner became apprehensive and informed his then attorney that he did not desire him to represent petitioner, and that he desired an adjournment for the purpose of obtaining new counsel (R. 10, 11, 12), but the court denied this request and refused any further adjournment, and the petitioner was compelled to proceed to trial. The case was tried on December 20th, December 21st and December 22nd, and resulted in petitioner's being convicted on all counts in which he was named in said indictment, and was immediately sentenced to a term of fifteen years, as above set forth.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. Constitution of the United States, Fifth Amendment:

   "* * * nor be deprived of life, liberty or property without due process of law."

2. Statutes. Title 21, Section 174, United States Code:

   "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

[2] (R.) refers to filed record.

any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years."

3. Title 18, Section 371, United States Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

As has heretofore been set forth, Federal jurisdiction in the trial court stems from Title 21, Sections 173-174, United States Code, and from Title 18, Section 371, United States Code.

REASONS FOR THE ALLOWANCE OF THE WRIT.

Due process in criminal cases requires not only that the accused be entitled to representation by counsel, but that the defendant shall have complete confidence in said counsel and that the assistance furnished shall be effective. Petitioner's assigned counsel herein apparently worked vigorously, but as the results proved, ineffectively. He apparently had been under the misunderstanding that he would have no difficulty in securing the presence of the two witnesses that the petitioner desired to testify in his behalf at the trial, and the petitioner apparently relied upon this commitment;

that when petitioner learned that he would not have these witnesses available for him, he lost confidence in his lawyer, and thereupon arranged to secure a lawyer, one Thomas F. Burchill (R. 12, 13, 14). The court refused a one-day adjournment, despite the fact that through circumstances beyond the control of any of the parties, the case had been extended for more than ten days. Surely, in a case resulting in the petitioner's receiving so severe a sentence, he was entitled to every protection afforded to him by the Constitution.

Due to the fact that a conspiracy was charged in Count I of the indictment, together with the two witnesses whom the petitioner sought to produce at the trial, the government's principal witness (an agent) was permitted to testify to statements made by the co-defendants, not in the presence of the petitioner, wherein the co-defendants informed the said agent that petitioner was the person who would deliver the narcotics to him and that he, petitioner, was working with said co-defendants. This hearsay testimony was evidently permitted by reason of the fact that they were allegedly statements made by co-conspirators in furtherance of the said conspiracy. The testimony of the said witnesses, Musarra and Constantino, therefore, became of paramount importance to the petitioner, as they could have put in issue before the jury the fact as to whether or not such conversations ever did take place. The affidavit of the trial attorney for the petitioner, which begins at page 14 of the appendix to the appellant's brief in the United States Court of Appeals, clearly shows that the trial attorney had interviewed the said two witnesses on December 6, 1954, just four days before the impanelling of the jury for the trial of this case, and that in his opinion they were necessary and indispensable witnesses.

The production of these witnesses before the Court would have at most, required an extension of the trial for a matter of twenty-four or forty-eight hours, and the failure of the Court to grant such a short adjournment, in effect, violated

the Fifth Amendment of the United States Constitution, and deprived the petitioner of his liberty without due process of law.

There is no question that the observance of the constitutional safeguards surrounding a fair trial is such a basic jurisdictional requirement, that when absent, a conviction must be set aside. *Johnson* v. *Zerbst,* 304 U. S. 458.

THE SENTENCE GIVEN TO PETITIONER WAS EXCESSIVE.

Immediately after the jury rendered its verdict, the trial court sentenced petitioner. He gave petitioner the maximum sentences permitted, namely five years on each count, to run consecutively, plus the maximum fine of $2,000, which later was remitted. The Judge's remarks (R. 236, 237, 238) clearly showed that the Trial Judge was prejudiced against this petitioner though there was a complete absence of testimony which justified the display of judicial hostility underlying the sentencing itself. The record was short and no untoward circumstances intervened. There was no danger or hardship attendant upon anything relating to the circumstances of the treasury agent's processing of this case, and this, in addition to the fact that the convicted petitioner stood before the Seat of Justice carrying a bullet in his body, adjacent to his spine, inflicted upon him by the principal witness for the government, the effects of which could never be foretold, except possibly one thing—namely, he might not, because of such bullet, outlive his sentence.

Thus, no consideration or calculation was made for this additional punishment. Thus physical pain and injury were in addition to the maximum period of incarceration the law permitted the Judge to impose.

Illustrating the violent feeling engendered by the conviction, were remarks by the court, as follows:

> "The Court: Now, Mr. Paccione, I don't expect to see a case for a long time in which there is so little

> that can be said in behalf of the defendant at time of sentence. I am going to give you an extremely heavy sentence. I am going to give you the maximum which I can impose of five years on each count, to run consecutively."

Some justification could be found for such remarks if the sentencing Judge had before him a probation report where an investigation had been made and the report justified such a finding by the sentencing Judge. The record is barren here of any such justification.

The petitioner herein was sentenced not only to the maximum sentence on the substantive count, but also was sentenced to five years on the conspiracy count.

The disparity between the sentences meted out to the co-defendants and the petitioner is glaring.

The conspiracy charge in the indictment was formed for the express purpose of carrying out the substantive counts, and should, of necessity, merge with the substantive counts for the purpose of imposing punishment. The entire theory of the government was that the conspiracy was formed for such purpose. The Court of Appeals for the Second Circuit, on several occasions has expressed disapproval of such cumulation. *United States* v. *Chiarella,* 2 Cir., 184 F. 2d 903; *United States* v. *Pagano,* not officially reported, decided July 5, 1955, 2 Cir.

The learned Circuit Court, in approving the sentence in this case, said:

> "But in this instance there was, perhaps, more than the usual justification for requiring separate service of the sentences."

Petitioner has failed to find from this record the basis for such a finding.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has decided the Federal questions here involved as shown in conflict with the applicable decisions of this Court, and in violation of the Fifth Amendment of the United States Constitution.

CONCLUSION.

FOR ALL OF THESE REASONS PETITIONER RESPECTFULLY PRAYS THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW ITS JUDGMENT AFFIRMING THE JUDGMENT OF CONVICTION OF PETITIONER.

Dated: New York, N. Y., September 19, 1955.

Respectfully submitted,

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APPENDIX "A".

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 341 October Term, 1954.

Argued June 9, 1955. Decided July 27, 1955.

Docket No. 23631.

UNITED STATES OF AMERICA,

Appellee,

—*vs.*—

ANGELO PACCIONE,

Defendant-Appellant.

Before: CHASE, MEDINA, *Circuit Judges*, and RYAN, *District Judge*.

Appeal from a judgment of the District Court for the Southern District of New York. Walsh, *Judge*. Affirmed.

The appellant was tried by jury on an indictment one count of which charged the sale of one-fourth ounce of heroin and another the possession of ten ounces of heroin in violation of the federal laws relating to narcotics (Sections 173-174 of Title 21, U. S. C.). Another count charged a conspiracy to violate the federal narcotic statutes. He was found guilty on each count and was sentenced on each. This appeal is from that sentence.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, Attorney for Appellee.

ROBERT M. PENNOYER, Assistant United States Attorney, of Counsel.

WALTER J. DI DONATO and JOHN H. MARIANO, Attorneys for Appellant.

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Per Curiam:

The appellant relied for reversal upon the insufficiency of the evidence to show the conspiracy as alleged and resulting error in allowing a narcotic agent to testify to statements made to him by alleged co-conspirators. Also upon the refusal of the court to continue the trial to allow him to obtain substitute trial counsel and to procure the attendance as witnesses for the defense of two alleged co-conspirators who were in jail in Michigan; upon error in the charge and upon the excessiveness of the sentences. We find no merit in any of these contentions.

There was ample evidence to show that the appellant and the two co-conspirators acted in concert in furtherance of an understanding they had with each other to violate the federal narcotic laws and as the statements of the co-conspirators which the agent testified were made to him were in connection with the sale of heroin delivered by the appellant to the agent they were in furtherance of the conspiracy and clearly admissible. United States v. Dennis, 2 Cir., 183 F. 2d 201.

The effort to secure time for the substitution of trial counsel was not made until ten days after the jury had been drawn and only when, after repeated delays, the trial was about to begin. The trial attorney who had represented the appellant for about a year and a half was present in court ready and able to conduct the defense and no fair reason was shown for causing further delay in starting the trial which such a belated attempt to have other counsel present would entail. Without adequate cause shown for such a request, the denial of it was without error. United States v. Mitchell, 2 Cir., 138 F. 2d 831, cert. denied 321 U. S. 794.

Nor was it an abuse of discretion to deny the appellant's application, made the morning the trial began, for the production in court at the expense of the government of the co-conspirators who were in jail. Weeks v. United States, 9 Cir., 179 F. 2d 319. Before the jury was drawn appellant's attorney had been asked by the government's attorney

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"whether he would want the witnesses brought back so that we could then set a trial date with time for him to bring them back." Yet he had not made known any such desire before, or when, the jury was drawn. Nor was any application made to have them subpoenaed pursuant to Rule 17(b), F. R. C. P.

The judge charged generally, as well he might, that the jury should take into account the interest, if any, which a witness had in the outcome of the trial in evaluating the testimony of such witness and that the appellant, who testified in his own defense, was an interested witness. Reagan v. United States, 157 U. S. 301. At the close of the charge the appellant requested the court to charge that the narcotics agent who testified for the government "is an interested party in the same sense that the defendant is in a similar degree." Regardless of any lack of timeliness in making this request, it was such an obvious exaggeration of the interest of the agent that there was no error in refusing to give it.

The sentences were, indeed, severe and the more so because, though the fines imposed have been remitted, the terms of imprisonment on the substantive counts and that on the conspiracy counts must be served consecutively.

Making conspiracy count sentences run consecutively with those on substantive counts is not unlawful where, as here, the substantive crimes were of such a nature that concerted action was not necessary for their commission. Pereira v. United States, 347 U. S. 1. We have at times expressed our disapproval of such cumulation, United States v. Chiarella, 2 Cir., 184 F. 2d 903, and recently in United States v. Pagano, — F. 2d. —, decided July 5, 1955, but in this instance there was, perhaps, more than the usual justification for requiring separate service of the sentences.

Judgment affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 419

ANGELO PACCIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 11–12) is reported at 224 F. 2d 801. The District Court filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1955 (Pet. App. 10). On August 22, 1955, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including September 24, 1955, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether refusal of the court to grant, on the day of trial, 19 months after the indictment was filed, a writ of habeas corpus *ad testificandum* for the production of two codefendants who were in prison constituted an abuse of discretion.

2. Whether petitioner was denied effective representation of counsel by reason of the trial court's refusal of a continuance to enable him to secure new counsel on the day of trial.

3. Whether the sentence was excessive.

RULE INVOLVED

Rule 17, Federal Rules of Criminal Procedure, in pertinent part provides:

RULE 17. SUBPOENA

* * * * *

(b) Indigent Defendants.

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the

witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

* * * * *

STATEMENT

Petitioner was charged in Counts IV and V of a five count indictment with sale of one-quarter of an ounce of heroin and possession of ten ounces of heroin, in violation of the federal narcotic laws, 21 U. S. C. 173–174. Count I charged a conspiracy to violate the federal narcotic laws, 18 U. S. C. 371. (R. 6–10.)

Petitioner was found guilty by the jury and sentenced to five years on each count, to run consecutively (R. 11–12, 40). On appeal, the judgment was unanimously affirmed (Pet. App. 12).

Two co-defendants, Anthony Musarra and Nicholas Constantino, were joined with Paccione in the conspiracy charge under Count I. Both were named as defendants in Counts II and III charging sales of one-quarter of an ounce of heroin on two separate dates, and Musarra was joined with Paccione on Count IV charging a sale of heroin. (R. 6–10; Pet. 3.) They entered pleas of guilty and were sentenced to four years imprisonment (Pet. 3).

The proceedings, insofar as they are relevant to issues raised in the petition for certiorari, may be summarized as follows:

1. The indictment against petitioner was filed on May 29, 1953 (R. 1). After repeated delays (Pet. App. 11), the trial began and a jury was selected on Friday, December 10, 1954. The case was adjourned until December 14 and again to December 16. Then, because of the illness of petitioner's counsel, Mr. Vecchiarello, it was further adjourned until Monday, December 20 (R. 46), when the actual taking of testimony began (Pet. 3).

On December 20, petitioner's attorney, for the first time, made an application to the court to subpoena co-defendants Musarra and Constantino from prison as witnesses for the petitioner (R. 43; Pet. App. 11). For a period of approximately a month prior to trial, the question of the production of the two co-defendants as witnesses for the defendant had been discussed. On Monday, December 6, 1954, government counsel had agreed to an adjournment to Wednesday, December 8, 1954, to permit petitioner's counsel to visit the two co-defendants in Milan, Michigan. At the same time, government counsel asked Mr. Vecchiarello to indicate when he returned whether he would want the two co-defendants produced, so that a trial date could be set which would allow for their production. (R. 44–45.)

On Wednesday, December 8, 1954, Mr. Vecchiarello stated that petitioner was ready for trial, without any reference to a request for production of the two co-defendants as witnesses on behalf of the defendant (R. 45). On Friday of that same week, Mr. Vecchiarello mentioned to the judge the possibility of having them brought back at government expense (R. 45), but he failed to make any formal application to have them subpoenaed pursuant to Rule 17 (b) of the Federal Rules of Criminal Procedure (Pet. App. 12).

When application for a subpoena was finally made on December 20, 1954, counsel stated that petitioner would not be able to pay for bringing in the witnesses immediately, but could "in a few days or so" (R. 44). The court said it would not adjourn the trial for this purpose and denied the application as untimely (R. 45). Petitioner neither offered to pay for their production immediately, nor did he apply to have them subpoenaed pursuant to Rule 17 (b) (R. 45).[1]

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[1] In the petition for certiorari (Pet. 4), appellant refers to the circumstance that his counsel, Mr. Vecchiarello, had initially been misinformed as to where these two witnesses were located, but fails to state that his counsel was subsequently correctly informed on this matter and in fact interviewed them about December 6 or 7, 1954, approximately two weeks prior to making the application for a subpoena (R. 14, 44–45).

Mr. Pennoyer, the Assistant United States Attorney, in opposing the application for a subpoena, stated, without

Immediately after the court had denied the application for a writ of habeas corpus *ad testificandum*, petitioner's attorney applied for a continuance to enable petitioner to engage another attorney (R. 45). Upon being informed that petitioner already had other counsel in mind, the trial judge granted a recess so that petitioner could contact him, although the court stated that he could not see why the proposed counsel was not there that morning if the petitioner wanted to substitute him (R. 47–48). When the judge learned that the proposed counsel could not be there that day, he refused to delay the trial further in view of the late date of the application, and asked Mr. Vecchiarello to continue to represent petitioner (R. 48). However, the court

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contradiction from Mr. Vecchiarello (R. 44–45):

> I think it is extraordinary that this application is being made at this time. For a period of approximately a month the question of these witnesses being brought in was discussed with Mr. Vecchiarello. I misinformed him on one occasion that they had arrived at the prison in Milan, Michigan, and he actually went out there and they weren't there. This was about three or four weeks ago. On his return I apologized to him and I told him that I would definitely ascertain when they arrived and let him know.
>
> Thereupon the case was on the calendar for two weeks ago today, a Monday. Mr. Vecchiarello asked me for an adjournment to permit him to travel out there to Milan to speak to these prisoners. I agreed to give him until Wednesday of that week and asked to indicate when he returned whether he would want the witnesses brought back so that we could then set a trial date with time for him to bring them back.

stated that the proposed counsel or any other lawyer could join petitioner's staff any time they would like to have him (R. 48).

2. The evidence adduced at the trial may be summarized in pertinent part as follows:

On May 2, 1953, Musarra telephoned Davis, an undercover agent of the Federal Narcotics Bureau, and agreed to sell him one-quarter of an ounce of "pure" heroin for $160. Davis met Musarra on May 6 and the latter told Davis that he had to make a telephone call to "his man." Upon Musarra's return, they went to meet Paccione who was introduced to Davis as "Angelo". (R. 50–52.) Paccione handed one-quarter of an ounce of heroin to Musarra, who handed it to Davis in exchange for $160 (R. 53). Paccione then told Davis in Musarra's presence that for future deliveries of heroin he need only call Musarra, let him know how much he wanted and Davis could then pick it up in a car which Paccione would have parked in a certain driveway (R. 53).

On May 8, 1953, at a pre-arranged meeting place, Davis met Constantino who informed Davis "They're bagging it up now, and Angelo will be over at 9:30" (R. 56–57). When Paccione appeared he did not have the heroin with him and instructed Davis to proceed to another place (R. 57). Upon arriving there, Paccione left the car, but returned in a few moment stating "I've got the stuff" (R. 58). As they drove away, Pac-

cione cautioned Davis "not to ever trust the kids [Musarra and Constantino] with that kind of money, indicating the thousand dollars" (R. 59).

Shortly thereafter Davis stopped the car, confronted Paccione with his badge of office and a revolver, identified himself and told Paccione he was under arrest (R. 60). Davis told him to stand still and get up against the wall but Paccione broke and ran out into the street. Davis fired one shot into the air. When Paccione did not stop, Davis fired at Paccione's legs. When Paccione still kept running, Davis fired toward his hip and Paccione fell. (R. 15.)

3. At the time of sentence, the government pointed out that the two co-defendants were considerably younger than Paccione, that Paccione was the senior member of the group and the supplier for the two younger men (R. 38-39).

The court stated (R. 40):

> Now, Mr. Paccione, I don't expect to see a case for a long time in which there is so little that can be said in behalf of the defendant at time of sentence. I am going to give you an extremely heavy sentence. I am going to give you the maximum which I can impose of five years on each count, to run consecutively.
>
> I have seen in the Court of General Sessions and at other places the product of the people who become dependent on narcotics. In the case before this I had to sentence a man who was a peddler of

> narcotics, who compared to you was a very petty person indeed, and I see before me now the person who not only takes advantage of the weakness of those who need narcotics, but who uses people to become peddlers of this stuff.

ARGUMENT

1. There is no merit in petitioner's contention that he was deprived of due process because of the trial court's refusal to subpoena his co-defendants as witnesses (Pet. 2–3, 6–7). The judge was clearly justified in denying the application and refusing further to delay the trial under the circumstances presented by this record.

Petitioner had every opportunity to seek a writ of habeas corpus *ad testificandum* at least a month prior to the trial (R. 44; *supra,* pp. 4–6). After petitioner's attorney had returned from his interview with the prospective witnesses, he stated on December 8 (the actual trial began on December 20) that the petitioner was ready for trial, without any reference to a request for production of the two co-defendants as witnesses (R. 45; *supra,* p. 5). Even when he finally made an application for a subpoena on the day the trial started, he did not act as if he considered the witnesses indispensable. When the judge made it clear that he would not delay the trial, there was no offer to pay for their production immediately instead of "in a few days or so" (R. 44; *supra,* p. 5). Neither did he apply to have

them subpoenaed pursuant to Rule 17 (b) of the Federal Rules of Criminal Procedure (R. 45; *supra,* p. 2). He made no effort to show that the testimony which these witnesses would give would be pertinent (R. 43, 44, 45). It seems clear that the request for production was merely a dilatory tactic.[2]

It is fundamental that a trial court's action upon an application for a continuance is purely a matter of discretion and is not subject to review unless it is clearly shown that such discretion has been abused. *Isaacs* v. *United States,* 159 U. S. 487, 489; *Goldsby* v. *United States,* 160 U. S. 70, 72. The granting of a continuance for the purpose of producing prisoner witnesses is within the sound discretion of the judge. *Neufield* v. *United States,* 118 F. 2d 375, 380 (C. A. D. C.), certiorari denied, 315 U. S. 798. And since no formal application to have the witnesses subpoenaed under Rule 17 (b) was ever made (Pet. App. 12; *supra,* p. 5), the court was not required to order production of the two witnesses. *Meeks* v. *United States,* 179 F. 2d 319, 322 (C. A. 9).

2. Petitioner contends that he was denied effective representation of counsel by reason of the trial court's refusal of a continuance (Pet. 5–6). As in the case of the prior refusal to delay the

[2] The affidavit of petitioner's attorney, made more than three months after the actual trial, that he considered the testimony indispensable, is inconsistent with his conduct before trial.

trial (R. 45; *supra*, pp. 9–10), no abuse of discretion was shown. *Isaacs* v. *United States*, 159 U. S. 487, 489; *Goldsby* v. *United States*, 160 U. S. 70, 72.

Mr. Vecchiarello had represented petitioner in this case for a year and a half and had never previously indicated his disfavored position (R. 47; Pet. App. 11). Not until after the motion for a continuance for production of witnesses was denied was the motion to substitute counsel made. That was ten days after the selection of the jury for the trial. The judge stated several times that he had no objection to bringing in new counsel. However he properly refused to delay further the commencement of the trial for that purpose. (R. 45, 46, 47.)

As the Court of Appeals for the Second Circuit stated in *United States* v. *Mitchell*, 138 F. 2d 831, certiorari denied, 321 U. S. 794:

> * * * when a jury case is already on trial in a district with a crowded calendar such as obtains in the Southern District of New York, a continuance for the obtaining and indoctrination of new counsel would be disruptive of the court's business and could not be claimed under the circumstances except for rather exceptional cause.

3. Petitioner's contention that the sentence was excessive (Pet. 2, 7–8) raises no question for review.

As the Court of Appeals for the Second Circuit stated in *United States* v. *Rosenberg,* 195 F. 2d 583, 604, certiorari denied, 344 U. S. 838:

> Unless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera* v. *United States,* 8 Cir., 40 F. 2d 338, 340.

See also memorandum opinion of Mr. Justice Frankfurter when this Court denied a petition for rehearing in *Rosenberg* v. *United States,* 344 U. S. 889, 890. The district court's decision to impose a severe sentence stems, as the court indicated, from the evidence in this case showing that petitioner was the ringleader of an organized group selling narcotics.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955